

2015 WL 5770723 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Judicial District 15A.

Linda M. BENNETT, Executrix for Elizabeth H. Maynard, Deceased, Pro Se, Linda M. Bennett,
Personally, on Behalf of Herself and All Others Similarly Situated Pro Se, Plaintiffs-Appellants,

v.

HOSPICE & PALLIATIVE CARE CENTER OF ALAMANCE-CASWELL, Community Home Care and
Hospice, LLC, The Oaks of Alamance LLC, Dr. Beth Hodges and Dr. Jeffrey Brown, Defendants-Appellees.

No. 15-667.
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From Alamance County No. 14 CVS 1960

Defendants-Appellees' Brief

[Elizabeth P. McCullough](#), N.C. State Bar # 32301, Young, Moore and Henderson, P.A., P.O. Box 31627, Raleigh, NC 27622, Telephone: (919) 782-6860, Fax: (919) 782-6753), Email: epm@youngmoorelaw.com, for defendant-appellant, Dr. Beth Hodges.

[Nathan D. Childs](#), N.C. State Bar #35211, Young, Moore and Henderson, P.A., P.O. Box 31627, Raleigh, NC 27622, Telephone: (919) 782-6860, Fax: (919) 782-6753), Email: ndc@youngmoorelaw.com, for defendant-appellant, Dr. Beth Hodges.

[Ann C. Rowe](#), State Bar No.: 26686, Davis and Hamrick, L.L.P., P.O. Drawer 20039, Winston-Salem, NC 27120-0039, (336) 725-8385 ext. 116, arowe@davisandhamrick.com, for defendants-appellants, Hospice & Palliative Care Center of Alamance-Caswell and Dr. Jeffrey Brown.

[H. Lee Davis](#), Jr., State Bar No. 7683, P.O. Drawer 20039, Winston-Salem, NC 27120-0039, (336) 725-8385 ext. 107, ldavis@davisandhamrick.com, for defendants-appellants, Hospice & Palliative Care Center of Alamance-Caswell and Dr. Jeffrey Brown.

[Barry S. Cobb](#), State Bar No. 18970, Kelly A. Brewer, State Bar No.: 42707, Yates, McLamb & Weyher, LLP, P.O. Box 2889, Raleigh, NC 27602, (919) 719-6007 ([Barry S. Cobb](#)), (919) 835-0900 (Kelly A. Brewer), bcobb@ymwlaw.com, kbrewer@ymwlaw.com, for defendant-appellant, Community Home Care and Hospice, L.L.C.

[Norman F. Klick, Jr.](#), State Bar No. 24356, Carruthers & Roth, PA, P.O. Box 540, Greensboro, NC 27401, (336) 478-1162, nkf@crlaw.com, for defendant-appellant, The Oaks of Alamance, LLC.

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*1 STATEMENT OF THE CASE

On 15 October 2014, Plaintiffs-Appellants Linda M. Bennett, Executrix for Elizabeth H. Maynard (“Ms. Maynard”), deceased, pro se, and Linda M. Bennett, personally, on behalf of herself and all others similarly situated, pro se (“Plaintiffs”) filed their Complaint. (R p 19). Plaintiffs’ Complaint asserts causes of action for wrongful death, medical negligence/malpractice, negligence, loss of sepulcher, breach of contract, breach of *2 fiduciary duty, failure to notify next of kin, bad faith, **elder abuse** and/or conspiracy to commit **elder abuse**, and conspiracy and/or collusion. (R p 21). Plaintiffs did not allege an informed consent and/or common law battery claim. (R p 19, *passim*). Plaintiffs’ Complaint failed to specifically assert that “the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness pursuant to [Rule 702 of the North Carolina Rules of Evidence](#) and who is willing to testify that the medical care does not comply with the applicable standard of care” pursuant to [Rule 9\(j\)\(1\) of the North Carolina Rules of Civil Procedure](#) (“Rule 9(j)”), nor did the Complaint comply with [Rule 9\(j\)\(2\) or \(3\)](#). (R p 19, *passim*). Plaintiffs do not mention Rule 9(j) at all in the Complaint and do not challenge its constitutionality pursuant to the United States or North Carolina Constitutions. *Id.*

On 5 December 2014, Defendant-Appellee Hospice & Palliative Care Center of Alamance-Caswell (“Hospice of Alamance-Caswell”) filed its Motion to Dismiss. (R p 127). On 9 December 2014, Defendant-Appellee The Oaks of Alamance (“The Oaks”) filed its Motion to Dismiss. (R p 131). On 10 December 2014, Defendant-Appellee Dr. Jeffrey Brown (“Dr. Brown”) filed his Motion to Dismiss. (R p 135). On 12 December 2014, Defendant-Appellee Dr. Beth Hodges (“Dr. Hodges”) filed her Motions to Dismiss *3 Plaintiffs’ Complaint. (R p 139). On 23 December 2013, Defendant-Appellee Community Home Care and Hospice, LLC (“Community Hospice”) filed its Motion to Dismiss and In the Alternative Motion for a More Definite Statement. (R p 146). On 29 December 2014, Hospice of Alamance-Caswell filed its Supplemental Motion to Dismiss. (R p 152). Dr. Hodges, The Oaks, Dr. Brown, Community Hospice, and Hospice of Alamance-Caswell (collectively “Defendants”) moved to dismiss the Complaint pursuant to [Rule 12\(b\)\(6\)](#) based on Plaintiffs’ failure to comply with Rule 9(j), as well as on other grounds.

On 26 January 2015, a hearing was held on Defendants’ Motions to Dismiss and the Court’s Order granting Defendants’ Motions to Dismiss (“Order”) pursuant to [Rule 12\(b\)\(6\)](#) based on Plaintiffs’ failure to comply with Rule 9(j) was entered on the same date. (R p 155).

STATEMENT OF THE FACTS

On 17 April 2012, Ms. Maynard was admitted to hospice services with Community Hospice. (R p 69).¹ She was still living at the home of her daughter, Pamela Roney (“Ms. Roney”), when Ms. Maynard was admitted to Community Hospice's care. Ms. *4 Roney had Ms. Maynard's power of attorney. (T p 25).² Dr. Hodges was a physician working for Community Hospice and was the attending physician for Ms. Maynard as of 4 May 2012. (R pp 24, 68). Dr. Hodges was sent an Attending Physician's Letter of Responsibility from Community Hospice, which included in her role as the attending physician the “[m]edical management of the patient...” and “[s]igning the death certificate” if Ms. Maynard remained in her care at the time of death. (R pp 31, 69).

On 19 June 2012, Ms. Maynard was admitted to The Oaks, a residential inpatient hospice facility, where she continued to be provided hospice care by Community Hospice. (R p 76). According to a Community Hospice admission record dated 2 July 2012, Ms. Maynard was 76 years old and was admitted with a diagnosis of **Adult Failure to Thrive** with a past medical history that included **Chronic Obstructive Pulmonary Disease** (“COPD”), **coronary artery disease** (“CAD”), **hypertension** (“HTN”), a prior **myocardial infarction** (“MI”), **ischemic stroke**, **aortic aneurysm**, **Raynaud's Disease**, a 3 mm kidney lesion, **thoracotomy** for **pneumothorax**, **compression fractures** to multiple vertebrae, and depression. (R pp 35, 79, 99). She had also experienced symptoms of a cerebrovascular accident (“CVA”) over the “recent *5 period” and had developed right-sided weakness as well as a right-sided facial droop and incontinence, which subsequently resolved. (R p 99). She experienced intermittent times of worsening confusion as well as aggressive behaviors. *Id.* Ms. Maynard indicated that she wanted to avoid hospitalization if her condition worsened. *Id.*

On 13 July 2012, Dr. Hodges signed the “Physician Authorization” portion of the Resident Information form certifying that Ms. Maynard was under her care and that Ms. Maynard had a medical diagnosis with associated physical/mental limitations warranting the provision of personal care service in the plan of care while at The Oaks. (R pp 30, 79-81). Dr. Hodges accepted Ms. Maynard as her patient. *Id.* On 6 August 2012, Dr. Hodges indicated that Ms. Maynard's expected duration of care was 180 days. (R pp 37, 126).

On 24 September 2012, Ms. Maynard experienced an unwitnessed fall at The Oaks. (R p 25). At the time of the fall, Ms. Maynard's clinical diagnosis was “Nutrition – End of Life”. (R p 73). Two weeks prior to the fall, Ms. Roney thought Ms. Maynard was dying and at the time of the fall thought her mother was “on her way out”. (R p 73). Ms. Maynard's medical records indicate that she had a “poor appetite” and that she had the dietary needs of a “dying person”. (R p 73).

The fall was reported to Community Hospice and Ms. Maynard's daughter, Ms. Roney, and Ms. Roney directed that she did not want *6 anything other than comfort care to be provided to Ms. Maynard and *indicated that Ms. Maynard wanted the same*. (R pp 26, 73)(emphasis added). Ms. Roney did not want hospitalization or surgery for Ms. Maynard, but did agree for Ms. Maynard to undergo a **hip x-ray**. (R pp 26, 71-72). Dr. Hodges provided new orders for pain medication and a right **hip x-ray**. (R pp 26-27, 71). On the same date as the fall, Ms. Maynard underwent a **hip x-ray**, and a fracture of indeterminate age of the right femoral neck/right intertrochanteric (hip) region was observed. (R pp 27-28, 71). On 25 September 2012, Ms. Roney was notified of the x-ray findings and continued to decline treatment for Ms. Maynard's hip fracture and hospitalization. (R pp 28, 73). Dr. Hodges was also informed of Ms. Maynard's physical condition. (R p 28). Ms. Roney was informed by a Community Hospice nurse that there was a 98% chance of fatality in two to three weeks without treatment of the hip fracture, and Ms. Roney indicated her understanding and desire that Ms. Maynard have no further hospitalization or surgery. (R pp 29, 74). Ms. Roney also reported to a Community Hospice nurse that Ms. Maynard also agreed that she did not want further hospitalization and/or surgery. (R p 73). Ms. Roney “continue[d] to report that her mother does not wish for anything to be done and neither does she...” (R p 73). The Community Hospice nurse discussed the signs and symptoms (“s/s”) of decline and dying with Ms. Roney. *7 (R pp 29, 73-74). This conversation appears to have occurred in the presence of Ms. Maynard. (R pp 73-74).

On 5 October 2012, Dr. Hodges completed and signed a Hospice Certification of Terminal Illness form for Ms. Maynard. (R p 67). She indicated that Ms. Roney did not want Ms. Maynard sent to a hospital or hospice house or for surgery, but desired pain management. *Id.* Dr. Hodges again noted that she was aware of the associated mortality rate of the hip fracture without surgery and indicated that it was appropriate for Ms. Maynard to remain on the hospice service. *Id.*

On 14 October 2012, Ms. Maynard was transferred from the Oaks to Hospice of Alamance-Caswell. (R p 59). Dr. Hodges and Community Hospice did not provide hospice services to Ms. Maynard at Hospice of Alamance-Caswell. (R pp 23-24, 68). Dr. Brown was a physician working for Hospice of Alamance-Caswell as its Medical Director. (R pp 23-24). He assumed Ms. Maynard's care and subsequently signed Ms. Maynard's death certificate on 20 October 2012, listing her cause of death as **acute renal failure** secondary to **adult failure to thrive**. (R pp 35, 65-66, 101). Ms. Maynard's final death certificate indicates that she died on 20 October 2012, at Hospice of Alamance-Caswell from complications of a right hip fracture. (R pp 39, 59). Ms. Maynard was cremated. (R p 51). In the Complaint, Linda M. Bennett, Ms. Roney's sister, alleges that she was not contacted regarding the disposition of Ms. Maynard's remains and asserts ***8** that Ms. Maynard did not receive the burial she requested. (R p 52).

Plaintiffs allege that the actions and inactions of Defendants are believed to be the proximate cause of Ms. Maynard's injury and death. (R p 24). They seek "damages recoverable for death by wrongful act" and "expenses for care, treatment and hospitalization incident to injury resulting in death", among other relief. (R p 57).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT PLAINTIFFS' COMPLAINT CONSTITUTES A "MEDICAL MALPRACTICE ACTION" PURSUANT TO N.C. GEN. STAT. § 90-21.11 AND THEREFORE THAT RULE 9(j) CERTIFICATION WAS REQUIRED

N.C. Gen. Stat. § 90-21.11(2)(a) (2013) defines a "medical malpractice action" as:

- a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
- b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) *alleges a breach of administrative or corporate duties to the patient*, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-division a. of this subdivision.

***9** (Emphasis added). Plaintiffs' Complaint alleges that it is an action related to the furnishing of medical care and purports to assert claims for wrongful death and medical malpractice. *See e.g.*, R p 21. Thus, the Complaint is a "civil action for damages for personal injury." Further, the alleged injuries arise out of the furnishing of health care services. Plaintiffs allege in the Complaint that it is a Complaint for "Medical Negligence/Medical Malpractice." ³ *Id.*

However, Plaintiffs argue in their Brief that "[t]he prerequisite for a complaint alleging medical malpractice is not present in this case" and, therefore, argue that Rule 9(j) certification is not required. (Plaintiffs-Appellants' Br p 9). However, Rule 9(j) certification clearly is required for the reasons set forth herein. Accordingly, the Complaint is a medical malpractice action pursuant to N.C. Gen. Stat. § 90-21.11 and was required to contain a Rule 9(j) certification.

Rule 9(j) mandates that:

- (j) *Medical malpractice.*- Any complaint alleging medical malpractice by a health care provider... shall be dismissed unless:

***10** (1) The pleading *specifically* asserts that the medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

Thigpen v. Ngo, 355 N.C. 198, 201, 558 S.E.2d 162, 164-65 (2002) (emphasis in original)(quoting N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)(2008)). The Supreme Court, discussing Rule 9(j) stated:

Rule 9(j) clearly provides that “[a]ny complaint alleging medical malpractice … shall be dismissed” if it does not comply with the certification mandate… we find the inclusion of “shall be dismissed” in Rule 9(j) to be more than simply “a choice of grammatical construction.” While other subsections of Rule 9 contain requirements for pleading special matters, no other subsection contains the mandatory language “shall be dismissed.” *This indicates that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge.*

Thigpen, 355 N.C. at 202, 558 S.E.2d at 165 (internal citations omitted) (emphasis added).

Hence, any Complaint alleging medical malpractice “shall be dismissed unless” the plaintiff *actually complies* with Rule 9(j). In this case, Plaintiffs' Complaint did not comply with Rule 9(j) and the Complaint was required to be dismissed by the Trial Court.⁴ The North Carolina Supreme Court made it clear in ***11** *Thigpen* that any Complaint (not just causes of action) shall be dismissed if it contains a medical malpractice claim and does not have a proper Rule 9(j) certification. *Id.* Moreover, a myriad of appellate cases have reiterated the North Carolina Supreme Court's declaration that “Rule 9(j)'s requirements are strictly enforced and a Court *must* dismiss a *complaint* if it fails to meet its requirements.” *Thigpen*, 355 N.C. at 202 (emphasis in original). Hence, the Trial Court in this case properly dismissed Plaintiffs' Complaint.

Under N.C. Gen. Stat. § 90-21.11(2)(a), a “medical malpractice action” is defined as

[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care *by a health care provider*.

N.C. Gen. Stat. § 90-21.11(2)(a)(2013)(emphasis added). At the outset, there is no dispute that this is an action for personal injury and that all of the defendants are “health care providers” for purposes of Rule 9(j). Indeed, the Complaint alleges that Defendants provided medical and professional health care services. (R p 19, *passim*).

II. THE COURT PROPERLY DISMISSED THE PLAINTIFFS' COMPLAINT FOR FAILING TO FACIALLY COMPLY WITH RULE 9(j) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE BECAUSE ALL OF THE CAUSES OF ACTION ALLEGED IN PLAINTIFFS' COMPLAINT CONSTITUTE MEDICAL MALPRACTICE

Plaintiffs now argue for the first time that because Ms. Maynard did not consent to Defendants' medical treatment, there ***12** was no physician-patient relationship. Plaintiffs therefore contend their claims do not sound in medical negligence and no Rule 9(j) certification was required in the Complaint. (Plaintiffs-Appellants' Br p 25). This argument should not be considered by the Court and is not supported by the language of N.C. Gen. Stat. §§ 90-21.11, 90-21.12 and Rule 9(j), or by case law.

A. The Court should not consider for the first time on appeal Plaintiffs' assertions that their claims are informed consent claims

Plaintiffs did not assert a separate cause of action for failure to obtain proper informed consent in the Complaint. (R p 21). Plaintiffs assert this claim for the first time on appeal. As a result, this Court should not consider any such claim for the first time on appeal. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal..." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citing *Smith v. Bonney*, 215 N.C. 183, 184-85, 1 S.E.2d 371, 371-72 (1939) and *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Plaintiffs are not permitted on appeal to advance new theories or raise new issues. *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999). As a result, Plaintiffs' assertion for the first time on appeal that their allegations amount to a claim of informed consent should not be considered by this Court.

***13 B. Informed consent claims are medical malpractice claims and must comply with Rule 9(j)**

However, even if the Court should permit Plaintiffs' informed consent argument to proceed, this claim also requires dismissal pursuant to Rule 9(j). The Court of Appeals recently held that claims "based on lack of informed consent are medical malpractice claims requiring expert testimony and therefore must comply with the requirements of Rule 9(j)." *Kearney v. Bolling*, ___ N.C. App. ___, 774 S.E.2d 841, 850 (2015).

The informed consent statute provides that no recovery shall be allowed against a health care provider on the grounds of improper informed consent where:

[t]he action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities[.]

N.C. Gen. Stat. § 90-21.13(a)(1) (2013)(emphasis added). A plaintiff must certify through Rule 9(j) that she has an expert willing to testify to each standard of care applicable to the defendants, including the standard of care set out in N.C. Gen. Stat. § 90-21.13. *Kearney*, 774 S.E.2d at 850. See *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 145 (2001)(expert testimony is required to establish the standard of care regarding failure to obtain informed consent); see also

*14 *Clark v. Perry*, 114 N.C. App. 297, 306, 442 S.E.2d 57, 62 (1994)(G.S. § 90-21.13(a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care); *Nelson v. Patrick*, 58 N.C. App. 546, 548-49, 293 S.E.2d 829, 831 (1982)(G.S. § 90-21.13(a)(1) requires the use of expert medical testimony by the party seeking to establish the standard).

Because Plaintiffs' Complaint does not contain a Rule 9(j) certification, the Complaint, including any purported informed consent claim, was properly dismissed.

C. Plaintiffs allege in the Complaint that Defendants each had a health care provider-patient relationship with Ms. Maynard

Moreover, even if Plaintiffs were able to establish that appropriate informed consent was not obtained, that showing would not result in the inapplicability of Rule 9(j) to their claim. While the scope of *appropriate* treatment to be undertaken is defined by informed consent, a health care provider's provision of services that were not properly consented to is still "furnishing ... professional services in the performance of medical ... or other health care," N.C. Gen. Stat. § 90-21.11, and allegations of negligence during that health care are still "a medical malpractice action" within the meaning of the statute. The absence of valid informed consent would not change the applicability of duties owed to a patient or requirements for showing those duties via expert testimony.

*15 When a physician provides medical services, the physician must conform to the statutory standard of care set out in N.C. Gen. Stat. § 90-21.12(a). *Mozingo by Thomas v. Pitt Cnty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 585-86, 400 S.E.2d 747, 750-51 (1991) *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). To determine that a physician-patient relationship has been established, the

physician must accept a person as a patient and undertake to treat him or her. *Willoughby v. Kenneth W. Wilkins, M.D., P.A.*, 65 N.C. App. 626, 631-32, 310 S.E.2d 90, 94 (1983). In *Willoughby*, the Court of Appeals determined that a physician-patient relationship existed when the physician evaluated the plaintiff's physical condition and rendered medical advice to her. *Id.* at 632-33, 310 S.E.2d at 94-5. See also *Wheless v. Maria Parham Medical Center, Inc.*, __ N.C. App. __, 768 S.E.2d 119, 125 (2014), disc. reviewed denied, __ N.C. __, 771 S.E.2d 284 (2015) (when plaintiff is a patient of defendants, a clear physician-patient relationship exists).

North Carolina courts have only ruled that there is no physician-patient relationship in situations where there is no evidence that a defendant provided or was directed to provide the patient with medical care or otherwise attend to his needs. *Massengill v. Duke Univ. Med. Ctr.*, 133 N.C. App. 336, 337, 515 S.E.2d 70, 72 (1999). See also *Mozingo*, 101 N.C. App. at 586, 400 S.E.2d at 751 (defendant never accepted plaintiffs as patients or undertook to treat them so there was no consensual physician-patient *16 relationship). Plaintiffs have cited no case-- and Defendants have found no case-- in which a lack of informed consent provided the basis for taking the case outside the rules governing medical malpractice cases, but a court still permitted the case to go forward as an ordinary negligence claim.

Unlike the defendants in *Massengill* and *Mozingo*, Plaintiffs allege in the Complaint that each of the defendants in this case actually provided treatment to Ms. Maynard. Nurses at The Oaks evaluated and treated her, obtained her vital signs, turned and repositioned her, cleaned her, fed her, administered pain medication, and requested orders for her. (R pp 75-77).

According to the Complaint, Community Hospice nursing staff evaluated and treated her, implemented a care plan for her, carried out orders for her and provided advice and counseling to Ms. Roney and Ms. Maynard when advising them of the "98% chance of fatality in two to three weeks without treatment of the hip fracture" and the signs and symptoms of decline and dying. (R pp 29, 69, 73-74, 78, 82-84).

The Complaint alleges that Dr. Hodges signed paperwork on 13 July 2012 agreeing to undertake Ms. Maynard as a patient. (R pp 30, 79-81). On 24 September 2012, she wrote orders for pain medication and a right *hip x-ray*, and continued to be advised of Ms. Maynard's medical condition by nursing staff after her fall. (R pp 26-28). On 5 October 2012, Dr. Hodges completed and signed *17 a Hospice Certification of Terminal Illness form for Ms. Maynard. (R p 67).

According to the Complaint, after transfer to Hospice of Alamance-Caswell on 14 October 2012, Ms. Maynard received hospice care from the facility and Dr. Brown acted as her attending physician. (R pp 35-36, 65-66) Dr. Brown signed Ms. Maynard's original death certificate. (R pp 35-36, 101).

Not only did Defendants "furnish professional health care services," Plaintiffs argue in the Complaint that additional services should have been provided or recommended for Ms. Maynard's hip fracture. The Complaint and its allegations firmly establish a physician-patient relationship sufficient to support a medical malpractice claim under *Willoughby*, and to require compliance with North Carolina's rules for pleading such a claim.

D. The Court should not consider for the first time on appeal Plaintiffs' assertions that their claims amount to common law battery claims

Plaintiffs assert that because Defendants did not obtain Ms. Maynard's informed consent to their care and treatment (which is denied), any such treatment constitutes common law battery. (Plaintiffs-Appellants' Br p 25). However, Plaintiffs did not raise the cause of action of battery in their Complaint or at the Trial Court hearing on this matter. (R p 19, *passim*; T p 1, *passim*). As a result, this Court should not consider any such claims for the first time on appeal. "This Court has long held that issues and theories of a case not raised below will not be *18 considered on appeal." *Westminster Homes*, 354 N.C. at 309 (internal citations omitted). Plaintiffs are not permitted on appeal to advance new theories or raise new issues. *Hoisington*, 133 N.C. App. at 490. As a result, Plaintiffs' assertion for the first time on appeal (Plaintiffs-Appellants' Br p 25) that their allegations amount to a claim of common law battery should not be considered by this Court.

Even if this Court were to consider these assertions on appeal, Plaintiffs have failed to plead the necessary elements of common law battery as a battery is “the carrying of [a] threat into effect by the infliction of a blow.” *Dickens v. Puryear*, 302 N.C. 437, 444, 276 S.E.2d 325 (1981) (subsequent citations omitted). No such facts are alleged in Plaintiffs' Complaint.

E. Plaintiffs' argument that their claims are for “transportation” only, and are therefore not for medical malpractice, is not legally supportable

In their Brief, Plaintiffs contend that significant portions of the Complaint allege not a failure to perform professional services, but instead allege a “failure to transport and refer” which does not require a Rule 9(j) certification. They argue that “transportation” is defined as an “amenity” service outside the scope of health care in the statutes governing adult care homes (Plaintiffs-Appellants' Br p 28), and that the failure to “transport and refer” is a breach of the duty of reasonable care and diligence and the duty of best judgment, rather than a breach of the standard of care. (Plaintiffs-Appellants' Br p 31).

*19 While it may be true that the physical transporting of a patient from one place to another is not the provision of health care services, Plaintiffs' Complaint does not allege negligence in transporting Ms. Maynard. It is clear from a review of the Complaint that the purpose of the allegedly required transportation to the hospital was to obtain surgical treatment for Ms. Maynard's hip fracture.

Plaintiffs specifically allege that surgical intervention was needed (R pp 33, 43), despite Ms. Maynard being a hospice patient (R p 33), and even that “[a] compression screw plate device is considered to be standard of care” for repairing the fracture. (R p 34)(emphasis in original). They further attempt to allege a failure to comply with a “*Physicians [sic] Duty of care.*” (R p 43) (emphasis added). It is impossible to determine the validity of such claims under North Carolina law without reference to the “Standard of Health Care” set forth in N.C. Gen. Stat. § 90-21.12. Plaintiffs' belated argument that their claims do not involve compliance with the standards of practice for the health care providers sued is simply not consistent with what is pled in the Complaint.

In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that “pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim.” *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002). Furthermore,

*20 [a] party is bound by his pleadings and, unless withdrawn, amended or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.'

Bratton v. Oliver, 141 N.C. App. 121, 539 S.E.2d 40, 43 (2000), quoting *Davis v. Rigsby*, 261 N.C. 684, 686, 135 S.E.2d 33 (1964)(citations omitted)).

“Professional services” are acts or services

arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.

Smith v. Keator, 21 N.C. App. 102, 105-106, 203 S.E.2d 411, 415, aff'd, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L.Ed.2d 636 (1974)(citation and quotation omitted). Making decisions in health care that are “medical decisions requiring clinical judgment and intellectual skill” is a “professional service,” and claims for negligence in making those decisions require a Rule 9(j) certification. *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 630,

652 S.E.2d 302, 306 (2007). This is true both for decisions by physicians and for nurses making decisions requiring clinical judgment and intellectual skill. *Deal v. Frye Reg'l Med. Ctr.*, 202 N.C. App. 584, 691 S.E.2d 132 (2010)(unpublished opinion).

The “transportation” question to be litigated based on Plaintiffs' allegation would be whether the request of Ms. *21 Maynard--a hospice patient with a documented desire to avoid hospitalization (R p 99) and a history of intermittent worsening confusion, *id.*-- to go to the hospital should overrule the specific instructions (R pp 26, 43, 73) of a daughter, Ms. Roney (who had Ms. Bennett's power of attorney)(T p 25), not to hospitalize her.

Such a decision could be made by a physician or other health care provider only after assessing Ms. Maynard's level of confusion at the time of the request, considering the likelihood of successful operative management based on her complex medical condition, and evaluating the comfort care measures for pain management available at the adult care home where she was a resident. (R pp 73, 99). Such a decision clearly requires “clinical judgment” and “intellectual skill.” There is nothing about such a decision that is easily discernible to a lay juror, or a judge, without the assistance of expert medical testimony, because making decisions about proper management of severely ill patients is a “professional service.”

F. Plaintiffs' allegations regarding the failure to properly handle Ms. Maynard's body are medical malpractice claims and must comply with Rule 9(j)

The allegations regarding reporting the death and/or fall to DSS would not give rise to a private cause of action by Plaintiffs unless they could demonstrate that such requirements constituted the applicable standard of care which would require expert testimony. Moreover, there would be no causation between *22 the failure to report the death and/or fall and the death of the decedent. This is a wrongful death Complaint in which Plaintiffs have alleged that Defendants' medical negligence caused the death. Hence, these allegations cannot and should not exempt Plaintiffs from the strict requirements of Rule 9(j). Moreover, under the plain reading of *Thigpen*, if any of the claims require Rule 9(j) certification and Plaintiffs do not comply then “the Complaint shall be dismissed”. *N.C. Gen. Stat. 1A-1, Rule 9(j)* (2013).

Plaintiffs' allegation that there was mishandling of the corpse, would again not apply to Defendants Dr. Hodges, The Oaks or Community Health as they were not involved at the time of Ms. Maynard's death. Nonetheless, in *Dumouchelle v. Duke University*, 69 N.C. App. 471, 474, 317 S.E.2d 100 (1984), this Court stated:

The person entitled to possession of a body may recover damages for mental suffering caused by negligent or intentional mishandling or mutilation of the body, *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964). (emphasis added).

Therefore, Plaintiffs must have expert testimony to establish the standard of care and whether the proper defendant breached such standard of care. This also requires Rule 9(j) certification. No such certification was contained in the Complaint. As a result, Plaintiffs' Complaint was properly dismissed.

***23 III. RULE 9(j) IS CONSTITUTIONAL AND PLAINTIFFS HAVE FAILED TO PRESERVE ANY ISSUE AS TO ITS CONSTITUTIONALITY FOR CONSIDERATION BY THIS COURT**

Rule 9(j) has not been deemed to be unconstitutional pursuant to the United States and/or North Carolina Constitutions. In fact, the North Carolina Supreme Court held in *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101 (2002), that the Court of Appeals erred in addressing the constitutionality of Rule 9(j) and vacated the Court of Appeals' decision that Rule 9(j) violated the North Carolina and United States Constitution. As a result, to the extent that Plaintiffs cite to the Court of Appeals opinion in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), vacated in and appeal dismissed, 356 N.C. 415, 572 S.E.2d 101(2002), for the proposition that Rule 9(j) has been deemed to be unconstitutional, that opinion has been expressly overruled. *Id.*

Furthermore, in *Anderson*, the Supreme Court held that a constitutional question is addressed “only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary.” *Anderson*, 356 N.C. at 416 (emphasis in original). “To be properly addressed, a constitution issue must be ‘definitely drawn into focus by Plaintiff’s pleadings’”. *Id.* (citing *Hudson v. Atlantic Coastline R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955) cert. denied, *24 351 U.S. 949, 76 S. Ct. 844, 100 L.Ed. 1473 (1956)). When the record is completely devoid of any argument or development of factual record relating to the constitutional issue, the Court will not address it. *McKoy v. Beasley*, 213 N.C. App. 258, 265, 712 S.E.2d 712 (2011).

In the Complaint, Plaintiffs failed to raise any constitutional challenges to Rule 9(j). (R p 19, *passim*). Additionally, at the hearing of Defendants' Motions to Dismiss, Plaintiffs failed to present any argument that Rule 9(j) was unconstitutional and/or why it was unconstitutional. In fact, at the hearing, Plaintiffs only statement regarding a constitutional issue was as follows:

...but I also am alleging under my Constitutional rights that no matter what, my mother doesn't have money to hire any medical experts, but, 18— Section 18 of the Legislature says we're entitled to due process. Everyone is. So my mother is entitled to this due process.

(T p 37). As in *McKoy*, because Plaintiffs failed to raise any constitutional issue in the Complaint and/or and failed to present any argument to the Trial Court as to why Rule 9(j) is unconstitutional at the hearing of this matter, the Record in this case is completely devoid of any argument or development of factual record relating to the constitutionality of Rule 9(j) and this Court should not address it.

***25 IV. THE TRIAL COURT'S ORDER BASED ON DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS WAS APPROPRIATE AND DID NOT REQUIRE FINDINGS OF FACT**

It would be improper for a Trial Court to make findings of facts based on a Motion to Dismiss pursuant to Rule 12(b)(6). *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698 (1979). “The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading” and the Trial Court is to accept the allegations contained in the Complaint as true. *Id.* (citing *Sutton v. Duke*, 277 N.C. 94, 175 S.E.2d 161 (1970) and *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976)). As a result, contrary to Plaintiffs' contentions, it would have been error for the Trial Court to include findings of fact in its Order. The only question for the Trial Court was whether or not the Complaint facially complied with Rule 9(j).

Plaintiffs' reliance on *Estate of Wooden v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 731 S.E.2d 500 (2012), for the proposition that the Trial Court's Order needed to contain findings of fact is misplaced. In *Wooden*, the issue before the Trial Court was *not* facial compliance of the Complaint with Rule 9(j). In *Wooden* it was undisputed that the plaintiff's complaint included the required Rule 9(j) certification. *Id.* at 399. Rather the issue in *Wooden* was whether plaintiff's counsel could have reasonably expected plaintiff's designated Rule 9(j) expert to qualify as an expert witness and if not, whether dismissal was appropriate. *Id.* at 400. Under that factual *26 circumstance, findings of fact to support the trial court's legal conclusions are required. *Id.* at 403. Similarly, in *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812 (2012), the North Carolina Supreme Court held that when the Trial Court is considering whether a Rule 9(j) expert witness was reasonably expected to qualify, and the Trial Court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the Trial Court must make written findings of fact to allow a reviewing court to determine whether those findings are supported by competent evidence and whether the legal conclusions are supported by the findings. *Moore*, 366 N.C. at 32.

In this case, the Court considered Defendants' Motions pursuant to Rule 12(b)(6) and based its ruling and Order on the absence of any Rule 9(j) certification in the Complaint. (R pp 155-156). Furthermore, even if this Court were to determine that “findings of fact” were somehow required, the Trial Court's Order states as follows:

...Plaintiff's Complaint fails to specifically assert that: "the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under [Rule 702 of the Rules of Evidence](#) and who is willing to testify that the medical care did not comply with the applicable standard of care." Further, the Complaint does not allege facts establishing negligence under the existing common-law doctrine of res ipsa loquitur. Finally, the Court finds that all of Plaintiff's claims contained in her Complaint comprise a medical malpractice action as defined by [N.C. Gen. Stat. § 90-21.11](#).

***27** *Id.* The Trial Court clearly indicated the basis of its Order and its application of the law. *Id.* As a result, the Trial Court's order is appropriate and should be affirmed.

CONCLUSION

Because Plaintiffs' action arises out of the provision of medical services to Ms. Maynard by the Defendants, and Plaintiffs' Complaint did not contain the proper [Rule 9\(j\)](#) certification, Plaintiffs' Complaint was properly dismissed by the Trial Court. Based on the foregoing arguments and case law, the Trial Court properly granted Defendants' Motions to Dismiss pursuant to [Rule 12\(b\)\(6\)](#). Therefore, Defendants respectfully request that this Court affirm the Trial Court's Order Granting Defendants' Motions to Dismiss this action.

Respectfully submitted, this 24th day of September, 2015.

YOUNG, MOORE AND HENDERSON, P.A.

By: Electronically submitted

Elizabeth P. McCullough

N.C. State Bar # 32301

Attorneys for Defendant-Appellant

Dr. Beth Hodges

P.O. Box 31627

Raleigh, NC 27622

Telephone: (919) 782-6860

Fax: (919) 782-6753

Email: epm@youngmoorelaw.com

***28** [N.C. R. App. P. 33\(b\)](#) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

YOUNG, MOORE AND HENDERSON, P.A.

By: Electronically submitted

Nathan D. Childs

N.C. State Bar #35211

Attorneys for Defendant-Appellant

Dr. Beth Hodges

P.O. Box 31627

Raleigh, NC 27622

Telephone: (919) 782-6860

Fax: (919) 782-6753

Email: *ndc@youngmoorelaw.com*

DAVIS AND HAMRICK, L.L.P.

By: Electronically submitted

Ann C. Rowe

State Bar No.: 26686

Attorneys for Defendants-Appellants

Hospice & Palliative Care Center of Alamance-Caswell and Dr. Jeffrey Brown

P.O. Drawer 20039

Winston-Salem, NC 27120-0039

(336) 725-8385 ext. 116

arowe@davisandhamrick.com

By: Electronically submitted

H. Lee Davis, Jr.

State Bar No. 7683

Attorneys for Defendants-Appellants

Hospice & Palliative Care Center of Alamance-Caswell and Dr. Jeffrey Brown

P.O. Drawer 20039

Winston-Salem, NC 27120-0039

(336) 725-8385 ext. 107

ldavis@davisandhamrick.com

***29** YATES, MCLAMB & WEYHER, LLP

By: Electronically submitted

Barry S. Cobb

State Bar No. 18970

Kelly A. Brewer

State Bar No.: 42707

Attorneys for Defendant-Appellant

Community Home Care and Hospice, L.L.C.

P.O. Box 2889

Raleigh, NC 27602

(919) 719-6007 (Barry S. Cobb)

(919) 835-0900 (Kelly A. Brewer)

bcobb@ymwlaw.com

kbrewer@ymwlaw.com

CARRUTHERS & ROTH, PA

By: Electronically submitted

Norman F. Klick, Jr.

State Bar No. 24356

Attorney for Defendant-Appellant

The Oaks of Alamance, LLC

P.O. Box 540

Greensboro, NC 27401

(336) 478-1162

nfk@crlaw.com

Appendix not available.

Footnotes

- ¹ Plaintiffs attached numerous documents, including many of Ms. Maynard's medical records, to the Complaint. "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009)(internal citation omitted).
- ² Ms. Roney was inadvertently referred at the hearing as Pamela "Maynard." (T p 25). She was later referred to correctly as "Pamela Roney". (T p 27).
- ³ There is no dispute in this case that Plaintiffs' Complaint did not include a Motion pursuant to Rule 9(j)(2) and did not include a specific cause of action for a claim of res ipsa loquitur. (R p 19, *passim*; T p 7). Although Plaintiffs unsuccessfully argued to the Trial Court that their claims did not require Rule 9(j)(1) certification because the Complaint alleged facts establishing negligence under the existing common-law doctrine of res ipsa loquitur, Plaintiffs have failed to present and argue this issue in their Brief. Thus, any such issue and/or argument are deemed abandoned and, therefore, are not addressed herein by Defendants. *N.C. R. App. P. 28(a)*.
- ⁴ Furthermore, not only did Plaintiffs' Complaint not specifically assert compliance with Rule 9(j), Plaintiffs conceded at the Trial Court hearing that they did not have an expert witness prior to filing suit. (T pp 9-10, 37).

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